

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

Court of Appeal No. Cr. app. 28 of 1989

In the matter between:

ANDREW MOGOPODI Appellant

vs.

THE STATE Respondent

Appellant in person
Miss P. Solomon for the State

J U D G M E N T

Coram: Amissah, JP.
Aguda, JA.
Doyle, JA.

DOYLE, JA:

The Applicant was on 24/8/88 in the Magistrates' Court sitting at Jwaneng convicted of the offence of Unlawful Possession of rough or uncut precious stones contrary to section 6(1) (c) of the Precious Stones Industry Protection Act. The particulars of the offence states the rough or uncut stones to be diamonds valued at P19314.44. Applicant was sentenced to 5 years imprisonment of which two were suspended.

The Applicant appealed to the High Court and after a hearing his appeal was dismissed and he was refused leave to appeal to this Court. He now applies for such leave to appeal against both his conviction and sentence.

In the appeal to the High Court Applicant had filed a long string of grounds of appeal criticising numerous findings of the magistrate. In fact there was overwhelming evidence that the Applicant had been in

possession of rough or uncut stones, that he had formed an intent to misappropriate them and that he had taken steps to appropriate them by concealing one stone in a toilet and one stone in a laundry. He had also made entries in documents to conceal the loss.

Applicant was represented by Counsel. In the light of the facts Counsel abandoned all the grounds of appeal save one which was as follows -

"The learned magistrate erred in that he admitted the affidavit of the geologist and the valuer without leading viva voce evidence and such evidence amounted to hearsay evidence in the absence of a formal admission by the Defence."

In passing I may say that there appears to be an omission in this ground. It should refer to the certificate of the valuer. The intention is however clear.

The essence of the appeal was

- (a) that the proof that the stones were rough or uncut diamonds was by means of an affidavit from a geologist and that this was hearsay evidence and therefore inadmissible.
- (b) that the proof of the value of the stones was by a certificate of a valuer and that this was hearsay evidence and therefore inadmissible.

The learned Chief Justice heard the appeal. He held

- (a) in respect of the affidavit that it was hearsay but that it was admissible under S. 221 (4) of the Criminal Procedure and Evidence Act which provides for the admissibility of affidavit evidence of certain skilled persons including geologists.
- (b) in respect of the certificate of the valuer, that it was hearsay and that, as there was no Statutory provision for the admissibility of valuers' certificates, it had been wrongly admitted.

He went on however to consider the question whether it was necessary for the purposes of a charge of an offence under section 6 (1) (c) to

specify the value of the stones. He held that it was not. He also held that the admission of this piece of hearsay evidence had not affected the conviction nor had it deprived the Applicant of a fair chance of acquittal nor caused a failure of justice.

I have not the slightest doubt that the learned Chief Justice was entirely correct in his approach and his findings.

The learned Chief Justice concludes his judgment as follows -

"Learned Counsel for the appellant did not argue the appeal against sentence. Indeed in my opinion there is no merit in the appeal against sentence.

For the foregoing reasons I dismiss the appeal against conviction and sentence and confirm the conviction and sentence."

The Applicant has attempted to persuade this Court that on the facts he was wrongly convicted and seemed to think that recourse should not have been to the Courts but rather to the disciplinary processes of the mining company.

It is quite clear that it was not open to the Applicant to rehearse grounds which he had abandoned in the High Court on appeal. The application for leave to appeal against conviction must therefore be refused.

Unfortunately, as the argument at the appeal had been entirely in relation to the conviction, it was overlooked by learned Counsel for the defence and consequently by the learned Chief Justice that the exclusion of the evidence of value not only related to the conviction but also might have an effect on the sentence.

In considering sentence the learned magistrate adverted to the fact that the offence was very serious in that diamonds were of the highest importance in the economy of the country and that this type of offence would tend to cripple the economy. He found that the

Applicant was in a position of trust which aggravated the offence.
The maximum penalty for the offence was 15 years imprisonment.


He twice referred to the high value of the diamonds at P19314.44.
It is clear that the high value of the stones did play a part in the sentence imposed. Without this high value some lesser sentence would have been imposed.

I consider that leave to appeal against the sentence should be granted; that the hearing of the application should be treated as the hearing of the appeal and that the appeal should be allowed to the extent that a lesser sentence should be substituted.

It is not easy to determine what sentence the magistrate would have imposed in the circumstances. He might have called for evidence in the matter; that may be fortunate for the Applicant.

I would substitute a sentence of 2 1/2 years imprisonment of which one year is suspended on the same terms as those imposed by the magistrate on the original sentence. The sentence is to date from the date of arrest.

Delivered on the ...^{ck}..... day of December, 1989.

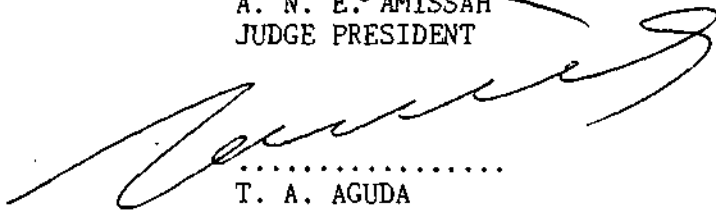


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B. A. DOYLE
JUDGE OF APPEAL



A. N. E. AMISSAH
JUDGE PRESIDENT

I agree



I agree

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T. A. AGUDA
JUDGE OF APPEAL